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NO. 06-97

IN THE
Supreme Court of the United States

STOLT-NIELSEN S.A.,
STOLT-NIELSEN TRANSPORTATION GROUP LTD.,
AND RICHARD B. WINGFIELD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the federal courts lack authority, under the Separation of Powers, to enjoin federal prosecutors from breaching a binding contractual obligation "not to bring any criminal prosecution" against a company and its executives?

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The New York Council of Defense Lawyers ("NYCDL") respectfully submits this brief *amicus curiae* in support of petitioner Stolt-Nielsen S.A. Letters from petitioner and respondent indicating consent to file have been filed with the Clerk. [1]

INTEREST OF AMICUS CURIAE

The New York Council of Defense Lawyers is a not-for-profit professional association of approximately 200 lawyers (many of whom are former federal prosecutors) whose principal area of practice is criminal defense in the federal courts of New York. The NYCDL's mission is to support and advance the criminal defense function by enhancing the quality of defense representation, taking positions on important defense issues, fostering understanding and consensus in areas of mutual concern to defense lawyers and prosecutors, and promoting collegiality among lawyers on both sides and the bench. In this brief supporting the petition for certiorari, the NYCDL seeks to offer the Court the perspective of practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts.

As lawyers who regularly must counsel their clients with respect to nonprosecution agreements and other arrangements in which the government agrees not to take certain action in exchange for information, NYCDL's members have a direct and immediate interest in the question presented. Avoiding indictment is frequently the principal motivation for entering into these arrangements, and the decision below casts considerable doubt on the value of entering into such agreements if they cannot be enforced

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[1] Pursuant to Rule 37.6, amicus states that no counsel for any petitioner or respondent authored this brief in whole or in part. No person or entity made a monetary contribution to the preparation or submission of this brief.

prior to indictment. The question presented is thus an important one that affects the functioning of the criminal justice system and the professional and ethical obligations of the criminal defense bar.

REASONS FOR GRANTING THE PETITION

In the decision for which review is sought, the Third Circuit held that federal courts are prohibited, by virtue of the constitutional Separation of Powers, from enjoining a prosecutor's imminent breach of a nonprosecution agreement with a putative criminal defendant. The holding, causing a Circuit split, raises important issues that impact both a critical component of our criminal justice system and defense counsels' ability to represent clients zealously pursuant to their ethical obligations under the law. Cooperation and nonprosecution agreements--in which putative defendants provide potentially incriminating information in exchange for certain prosecutorial promises that the information will not be used against them--are a cornerstone of the fair and efficient operation of the criminal justice system. In order to advise their clients as to whether to enter into such agreements, defense counsel need to know whether, and at what point, such agreements are enforceable. The Third Circuit's holding that the government's actions are only reviewable post-indictment deprives a putative defendant of one of the principal reasons for cooperating--to avoid indictment--and undermines confidence in the fair administration of justice. Accordingly, there is an essential and pressing need for guidance from this Court as to whether the government can be held to its part of these bargains.

THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE ADDRESSED BY THIS COURT.

A. The Agreement At Issue is Similar to Many Other Arrangements Routinely Negotiated by Prosecutors and Defense Counsel.

In the agreement that the petitioner entered into with the Antitrust Division of the Department of Justice, the government promised "not to bring any criminal prosecution" against the petitioner. Pet. App. 78a-79a. The agreement was executed in conjunction with the Antitrust Division's Amnesty Program, whereby in exchange for a company's early disclosure of incriminating information and promise of future cooperation, the government agrees to refrain from bringing a prosecution. The antitrust Amnesty Program is just one of a number of cooperation/ nonprosecution programs offered by the Department of Justice and other federal agencies. *See, e.g.*, HHS OIG Self Disclosure Protocol, 63 Fed. Reg. 58399 (October 30, 1998). Outside of formal agency programs, there are also a variety of situations in which an individual or company provides potentially incriminating information in exchange for what has heretofore been assumed to be an enforceable promise from the prosecutor. These arrangements are advantageous to the government, the putative defendants, and the public in that they can advance an investigation immeasurably with significantly fewer federal monies being spent.

Prosecutors make promises to forgo prosecution or grant informal witness immunity in all areas of criminal enforcement. *See, e.g., United States v. McFarlane*, 309 F.3d 510, 513 (8th Cir. 2002). For instance, if a target of an investigation can potentially benefit the government's case and the public interest by offering cooperation, government prosecutors may meet with the target in the initial stages of an investigation in what is known as a "proffer" session.

The purpose of a proffer session is to preview a potential witness's testimony and allow the prosecutor to assess that witness's credibility. To protect the target's interests, the government agrees under specific circumstances spelled out in the proffer agreement not to use the target's statements against him in a subsequent prosecution. Without the protection of such a promise, criminal targets would not agree to participate in proffers.

If the government determines that a witness is credible and his or her cooperation in prosecuting another target outweighs the need to punish the witness for their own conduct, the government will offer that witness an agreement under which the individual agrees to testify, providing incriminating information under oath, in exchange for the government's promise to obtain court-ordered use immunity pursuant to 18 U.S.C. §§ 6001-6005.

In other cases, similar to that of the petitioner, the government promises transactional immunity in exchange for on-going cooperation with a government investigation or prosecution. Under these agreements, referred to as nonprosecution agreements, the government agrees to forswear any prosecution of an individual or entity for crimes that may have arisen from certain facts.

Nonprosecution agreements and the other examples discussed above share a common purpose: they are all a means by which putative defendants, in exchange for providing incriminating information which might otherwise provide the prosecutor with a basis to bring an indictment, obtain a prosecutor's promise to exercise his or her discretion not to do so. And all provide significant and important benefits to both the government and putative defendants. The Department of Justice's policies recognize these agreements permit access to testimony or other information when "timely cooperation appears to be necessary to the public interest and other means of obtaining

the desired cooperation are unavailable or would not be effective." *U.S. Attorneys' Manual* § 9-27.600 (2002).

The individuals and corporations who agree to cooperate are seeking not only to avoid a trial and possible conviction, but also are motivated by a very real need to minimize the significant consequences of a criminal investigation or indictment. As a district court judge (and former prosecutor) aptly describes it: "The service of a single grand jury subpoena can ruin a person's livelihood and, on occasion, even jeopardize a person's life. A lengthy investigation is likely to change the target's life irrevocably, even if there is no indictment; an indictment almost certainly will change the target's life, even if there is no conviction." John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 425-26 (1997). If federal courts are precluded from taking action to enforce these agreements prior to indictment, as the Third Circuit held, the calculus of these arrangements changes considerably, because putative defendants have no assurance they will get what they bargained for.

B. If the Criminal Justice System Is to Function Smoothly and Fairly, Putative Defendants Need to Know Whether Such Agreements Can Be Meaningfully Enforced.

It is axiomatic that broad prosecutorial discretion is an "integral feature of the criminal justice system." *U.S. v. LaBonte*, 520 U.S. 751, 762 (1997). The court below, citing this Court's precedents, noted that the executive branch "has exclusive authority and absolute discretion to decide whether to prosecute a case." *Stolt-Nielsen, S.A. v. United States,* Pet. App. 12a (quoting *United States v. Nixon,* 418 U.S. 683, 693 (1974)). But inherent in that authority is the discretion to choose *not* to prosecute and, therefore, the ability to negotiate how that discretion shall be exercised. In

nonprosecution agreements such as the one at issue, defense counsel have long considered these agreements to be a self-imposed and enforceable limitation on the prosecutor's discretion, as long as the putative defendant also abides by the terms of the agreement.

In *Santobello v. New York*, 404 U.S. 257 (1971), this Court recognized that the "interests of justice" and "appropriate recognition of the duties of the prosecution in relation to promises made" gave the courts the authority both to order specific performance of a plea bargain or to permit a defendant to withdraw his guilty plea. 404 U.S. at 262-63. As the court noted, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262. The courts have recognized that "[i]mplicit in [*Santobello*'s] holding is the fact that the government may bargain away its discretion." *United States v. Watson*, 988 F.2d 544, 552 (5th Cir. 1993); *see also United States v. Alegria*, 192 F.3d 179, 182 (1st Cir. 1999) ("As a general rule, nothing precludes a prosecutor from bargaining away something over which he has discretion in return for promises extracted from a criminal defendant."). *Santobello*'s "logic" that the federal courts have the authority to hold prosecutors to their agreements "has been extended to immunity agreements and to cooperation agreements." *See In re Extradition of Drayer*, 190 F.3d 410, 412 (6th Cir. 1999) (citations omitted).

The holding below that the principles underlying the separation of powers deprive the federal courts of jurisdiction to enforce a nonprosecution agreement prior to indictment substantially undermines the logic of the Court's decision in *Santobello* and the safeguards that flow from it. It means that the prosecution unilaterally decides if the putative defendant has lived up to its obligations under the agreement, even though that is fundamentally a legal question ideally suited for disposition by the courts. *See, e.g.*

United States v. Brown, 801 F.2d 352 (8th Cir. 1986) (holding that defendant's cooperation agreement did not preclude indictment if defendant had breached agreement, and remanding for evidentiary hearing); *United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir.) ("The question of a defendant's breach [of a plea agreement] is not an issue to be finally determined unilaterally by the government."), *cert. denied*, 454 U.S. 831, 102 S.Ct. 127, 70 L.Ed.2d 108 (1981); *see also United States v. Minn. Mining & Mfg. Co.*, 551 F.2d 1106, 1112 (8th Cir. 1977) (holding that government breached its promise to "forego future criminal prosecution" in exchange for voluntary disclosure of criminal activity "by returning [an] indictment against defendants"); *United States v. Paiva*, 294 F. Supp. 742 (D.D.C. 1969) ("if, after having utilized its discretion to strike bargains with potential defendants, the Government seeks to avoid those arrangements by using the courts, its decision so to do will come under scrutiny").

The decision below has caused considerable uncertainty and consternation among corporate counsel and defense counsel such as *amici*, who are no longer certain as to the value or meaning of these agreements for their clients. *See, e.g.,* L. Stuart Ditzen, *Questions of Credibility After U.S. Reneges On Deal*, PHILA. INQUIRER B01 (March 7, 2005); Richard M. Cooper, *Nonprosecution Issues,* THE NATIONAL LAW JOURNAL, at 15 (Apr. 10, 2006); Pamela A. MacLean, *3d Cir. to Hear Hot Antitrust Issue, Judge Enjoined DOJ from Indicting Based on Breach of Immunity Deal*, May 16, 2005 NAT'L L. J. S1, col. 1; Sue Reisinger, *Promise Breakers,* CORPORATE COUNSEL at 21 (September 2006). Because these agreements nearly always require putative defendants to disclose potentially incriminating information, the uncertainty can pose acute professional and ethical concerns for defense counsel obliged to zealously represent their clients, if there is a possibility that the government may use that information to bring a criminal prosecution.

Like the plea bargains at issue in *Santobello,* nonprosecution and other types of cooperation agreements are "essential component[s] of the administration of justice" with many positive consequences that should be encouraged. 404 U.S. at 260. These arrangements are a means by which prosecutors can obtain the critical information that they need in conducting an investigation or securing a conviction, and they can provide an incentive to disclose potentially criminal conduct. But, also as in *Santobello*, "all of these considerations presuppose fairness in securing agreement between an accused and a prosecutor," *id.*, and they demand "appropriate recognition of the duties of the prosecution in relation to promises made." *Id.* at 262.

Over thirty years ago, the Fourth Circuit considered whether the entire executive branch was bound by a nonprosecution promise offered by a single government agent. *United States v. Carter*, 454 F.2d 426, 427-28 (4th Cir. 1972). The court dismissed potential "fear[s] that an United States Attorney may unreasonably bargain away the government's right and duty to prosecute" as sufficiently provided for in the administrative controls over nonprosecution agreements. *Id.* at 428. It also explained:

> There is more at stake than just the liberty of this defendant. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government. *Id.*

All of those factors are equally implicated by the decision below, which raises an important question of federal law meriting this Court's plenary consideration.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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